

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROBBY LEE ROBINSON,

Defendant.

CASE NO. 2:22-cr-00212-TL

ORDER GRANTING MOTION *IN*
LIMINE TO EXCLUDE PRIOR
CONVICTIONS OF WITNESS

This matter is before the Court on the Government's Motion *in Limine* to Exclude Prior Convictions of Witness (Dkt. No. 73). Having reviewed Mr. Robinson's response (Dkt. No. 89), the Government's reply (Dkt. No. 100), and the relevant record, the Court GRANTS the motion.

I. BACKGROUND

Mr. Robinson is charged by superseding indictment with one count of Unlawful Possession of Firearms and Ammunition, in violation of 18 U.S.C. § 922(g)(1). *See* Dkt. No. 60 (second superseding indictment). In advance of trial, the Government filed various motions, including the instant motion *in limine*. *See* Dkt. Nos. 73, 100. Mr. Robinson opposes. *See* Dkt. No. 88.

II. LEGAL STANDARD

“A motion in limine is a procedural mechanism to limit in advance [of trial] testimony or evidence in a particular area.” *United States v. Heller*, 551 F.3d 1108, 1111 (9th Cir. 2009) (citation omitted). In ruling on motions *in limine*, the Court is generally guided by Federal Rules of Evidence (“FRE”) 401, 402, and 403. *See* Fed. R. Evid. 401 (defining relevant evidence); *id.* 402 (relevant evidence is generally admissible); *id.* 403 (relevant evidence may be excluded if its probative value is substantially outweighed by a danger of “unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence”). While the FRE do not explicitly permit motions *in limine*, they are a part of a “district court’s inherent authority to manage the course of trials.” *Luce v. United States*, 469 U.S. 38, 41 n.4 (1984). A motion *in limine* is ordinarily granted only if the evidence at issue is inadmissible on all potential grounds; if not, the evidentiary ruling is better deferred until trial, to allow for questions of foundation, relevancy, and prejudice to be resolved with the appropriate context. *See United States v. Sims*, 550 F. Supp. 3d 907, 912 (D. Nev. 2021). A motion *in limine* should not be used to resolve factual disputes or weigh evidence. *Id.*; *Liu v. State Farm Mut. Auto. Ins. Co.*, No. C18-1862, 2021 WL 717540, at *1 (W.D. Wash. Feb. 24, 2021).

A court’s ruling on a pre-trial motion *in limine* is preliminary and can be revisited at trial based on the facts and evidence as they are actually presented. *See, e.g., Ohler v. United States*, 529 U.S. 753, 758 n.3 (2000) (“[I]n *limine* rulings are not binding on the trial judge, and the judge may always change his mind during the course of a trial.”). “Indeed even if nothing unexpected happens at trial, the district judge is free, in the exercise of sound judicial discretion, to alter a previous *in limine* ruling.” *Luce*, 469 U.S. at 41–42; *see also City of Pomona v. SQM N. Am. Corp.*, 866 F.3d 1060, 1070 (9th Cir. 2017) (district court may change its *in limine* ruling at trial if testimony brings unanticipated facts to the court’s attention).

1 Subject to these principles, the Court issues this ruling for the guidance of the Parties.

2 III. DISCUSSION

3 The Government seeks an order excluding “any discussion or evidence related to the
4 prior offenses” of D.W., one of its testifying witnesses. Dkt. No. 73 at 1. The prior convictions
5 are: (1) a 2005 conviction for Rape of a Child (*see* RCW 9A.44.073), for which D.W. was
6 released from custody in 2016; (2) a 2001 misdemeanor conviction for Assault; and (3) a 1996
7 misdemeanor conviction for Driving While License Suspended or Revoked. *See* Dkt. No. 73 at 3.

8 The Government argues that all of the prior convictions have no probative value and yet
9 present “a real danger” of prejudice. *Id.* at 3–4. Mr. Robinson agrees that “the misdemeanor
10 convictions are inadmissible under Fed. R. Evid. 609” and thus that “the motion should be
11 granted” as to those convictions. Dkt. No. 88 at 1–2. However, Mr. Robinson argues that
12 impeachment using the 2005 conviction, a felony, should be allowed “subject to restrictions to
13 guard against prejudice.” *Id.* at 1. Specifically, he proposes that he be allowed to refer to “a Class
14 A violent crime against a person,” as well as D.W.’s prison sentence and violations of
15 supervision. *Id.* at 5. The Government rejects this proposal but requests, in the alternative (should
16 the Court find the probative value of the prior conviction is not substantially outweighed by the
17 danger of unfair prejudice), that Mr. Robinson be allowed to refer to only the fact of a felony
18 conviction. *See* Dkt. No. 100 at 4.

19 A. Legal Standard

20 Federal Rule of Evidence 609 governs the impeachment of a witness—that is, “attacking
21 a witness’s character for untruthfulness”—using a prior conviction. The rule requires that
22 evidence of a criminal conviction for a crime that was punishable by imprisonment for more than
23 one year “must be admitted, *subject to Rule 403*, in a . . . criminal case in which the witness is
24 not a defendant.” Fed. R. Civ. P. 609(a)(1)(A) (emphasis added). Therefore, while evidence of a

felony conviction that occurred within 10 years of the conviction or release from custody for a non-defendant witness in a criminal case “must be admitted,” it still must first pass the balancing test of Federal Rule of Evidence 403.¹ *Id.* A district court has “broad discretion” under this Rule.² *United States v. Rowe*, 92 F.3d 928, 933 (9th Cir. 1996).

For the same non-defendant witness, evidence of *any* conviction that is more than 10 years old is admissible only if “its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect.” Fed. R. Evid. 609(b)(1).

B. Application

As an initial matter, Mr. Robinson concedes that the 1996 and 2001 misdemeanor convictions are inadmissible. *See* Dkt. No. 88 at 2. Therefore, the Court GRANTS the motion as to the misdemeanor convictions.

The remaining question is whether the 2005 felony conviction may be used and in what manner. The Court finds that evidence of D.W.’s 2005 conviction must be excluded, as its probative value is substantially outweighed by a danger of unfair prejudice and confusion. *See Rowe*, 92 F.3d at 933 (in prosecution for carjacking and use of firearm during crime of violence, upholding exclusion of government witness’ prior theft conviction that carried “a lot of prejudice

¹ Rule 403 permits a court to exclude relevant evidence “if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” Fed. R. Evid. 403.

² The Government suggests that the Court should evaluate the “*Cook* factors” laid out by the Ninth Circuit to weigh the probative value of a prior conviction against its prejudicial effect when used to impeach a criminal defendant. *See* Dkt. No. 100 at 2; *United States v. Jimenez*, 214 F.3d 1095, 1098 (9th Cir. 2000); *see also United States v. Cook*, 608 F.2d 1175, 1185 n.8 (9th Cir. 1979) (en banc), *overruled on other grounds by Luce v. United States*, 469 U.S. 38 (1984). The Ninth Circuit has never applied the *Cook* factors to the impeachment of a non-defendant witness in a criminal case, though it has suggested that the *Cook* factors are “appropriate,” but not required, in application of Rule 609(b) in a civil case. *See Simpson v. Thomas*, 528 F.3d 685, 690 n.3 (9th Cir. 2008). Occasionally, district courts have applied the *Cook* factors to non-defendant witnesses. *See, e.g., Stevenson v. Holland*, 504 F. Supp. 3d 1107, 1133 (E.D. Cal. 2020); *United States v. Mercado*, No. CR18-549, 2020 WL 999842, at *3 (N.D. Cal. Mar. 2, 2020). While the Court is hesitant to apply the *Cook* factors in a context other than impeachment of a defendant, the Court bears the factors in mind while conducting its Rule 403 analysis.

1 and almost no probative value”); *United States v. Jones*, 243 F.3d 551 (9th Cir. 2000) (mem.) (in
 2 prosecution for conspiracy to possess counterfeit checks, upholding exclusion of government
 3 witness’ prior assault conviction); *see also IDS Prop. & Cas. Ins. Co. v. Fellows*, No. C15-2031,
 4 2017 WL 2600186, at *6 (W.D. Wash. June 15, 2017) (in civil suit over insurance policy,
 5 upholding exclusion of witness’ prior drug distribution conviction). While undoubtedly a grave
 6 offense that demonstrates “a lack of respect for the persons or property of others,” D.W.’s
 7 conviction “do[es] not ‘bear directly on the likelihood that [a person] will testify truthfully.’”
 8 *United States v. Glenn*, 667 F.2d 1269, 1273 (9th Cir. 1982) (quoting *United States v. Hayes*, 553
 9 F.2d 824, 827 (2d Cir. 1977)); *see also Cordoba v. Pulido*, No. C12-4857, 2018 WL 500172, at
 10 *2 (N.D. Cal. Jan. 20, 2018) (noting that “a murder conviction is not probative of veracity”). The
 11 probative value is further diluted by the passage of time—the conviction itself is 18 years old,
 12 and D.W. has no further convictions since his release in 2016.³ *See also United States v.*
 13 *Bensimon*, 172 F.3d 1121, 1127 (9th Cir. 1999) (in prosecution for drug conspiracy, finding the
 14 probative value of a “stale” 17-year-old mail fraud conviction to be “very low” and unaffected
 15 by the importance of the testimony).

16 At the same time, “rape and sexual assault convictions are among the most prejudicial
 17 types of information the jury could learn” about a witness. *Scott v. Lawrence*, 36 F.3d 871, 874
 18 (9th Cir. 1994); *see also Goods v. Los Angeles Cnty. Sheriff*, No. C11-2948, 2015 WL 13916520,
 19 at *3 (C.D. Cal. Dec. 1, 2015) (noting the “extraordinarily high” danger of undue prejudice from
 20 prior convictions for rape, forcible oral copulation and kidnapping). Mr. Robinson’s proposal to
 21

22 ³ The Government also argues that “D.W.’s credibility is not central to the government’s case.” Dkt. No. 100 at 3.
 23 But the events depicted on D.W.’s “dashcam video” will necessarily be interpreted by the jury, and the 911 audio
 24 recording is of D.W.’s own statements. The credibility of D.W., the alleged victim, is important enough to the case
 to weigh in favor of admission. Still, the Court excludes the evidence because its probative value is substantially
 outweighed by its potential prejudicial impact.

1 cure the prejudice with a “generic identifier” concedes the prejudicial nature of the prior
2 conviction. But his proposal only *magnifies* potential prejudice and adds confusion by leaving
3 the jury to speculate as to *which* “Class A violent crime against a person” was committed—an
4 inquiry that could run far afield of D.W.’s *actual* conviction to, for example, murder or vehicular
5 assault. *See United States v. Garnes*, No. CR22-487, 2023 WL 4489983, at *6–7 (E.D.N.Y. July
6 12, 2023) (under Rule 403, finding “no way to structure the admission” of defendant’s
7 statements about unspecified prior “felonies” such that jury would not speculate as to the nature
8 of the prior convictions while defendant would not be unfairly prejudiced).

9 The Court also finds that evidence of the details of D.W.’s 2005 conviction must also be
10 excluded. First, “absent exceptional circumstances, evidence of a prior conviction admitted for
11 impeachment purposes may not include collateral details and circumstances attendant upon the
12 conviction.” *United States v. Osazuwa*, 564 F.3d 1169, 1175 (9th Cir. 2009) (alteration in
13 original) (quoting *United States v. Sine*, 493 F.3d 1021, 1036 n.14 (9th Cir. 2007)). “Generally,
14 ‘only the prior conviction, its general nature, and punishment of felony range [are] fair game for
15 testing the defendant’s credibility.” *Id.* (quoting *United States v. Albers*, 93 F.3d 1469, 1480
16 (10th Cir. 1996)); *see also United States v. Brown*, 927 F.2d 406, 408 (8th Cir. 1991) (noting that
17 Rule 609(a) “bears little or no relation to prior arrests, pending indictments, plea agreements, and
18 probation violations”). Plus, evidence of D.W.’s length of sentence and post-release supervision,
19 as well as violations of the terms of supervision, has almost no probative value yet will unfairly
20 prejudice and confuse the jury. *See Gray v. Clark*, No. CR20-196, 2023 WL 1803720, at *3
21 (E.D. Cal. Feb. 7, 2023) (“In this district, courts typically find the prejudicial effect of a specific
22 sentence length outweighs any probative value, unless the sentence length bears on a relevant
23 issue.”); *cf. Navarro v. Ryan*, No. C12-1899, 2018 WL 6681867, at *13 (D. Ariz. Jan. 12, 2018)
24 (“[V]iolations of probation, conditions of release, and escape are not probative of a witness’s

character for truthfulness or untruthfulness” (quoting *United States v. Morrow*, No. CR04-355, 2005 WL 3163801, at *4 (D.D.C. June 2, 2005))), *adopted as modified*, 2018 WL 6667239 (Dec. 19, 2018); *United States v. Perkins*, 287 F. App’x 342, 349–50 (5th Cir. 2008) (finding a probation violation “does not speak to [the government witness’s] truthfulness, but is merely a broken promise which indicates a lack of loyalty to commitments”).

Finally, at the pretrial conference, the Government proffered details of D.W.’s supervision violations—which Mr. Robinson sought to uncover through his requested preliminary examination of D.W—and indicated that none of the violations “involved false statements or dishonesty.” Dkt. No. 88 at 6. Therefore, Mr. Robinson will not be permitted to question D.W. on those details before the testimony.

For these reasons, the Court also GRANTS the motion as to the felony conviction. However, the Court cautions that should D.W. “open the door” on direct examination, Mr. Robinson may then be permitted to use the conviction for impeachment. *See United States v. Curtin*, 588 F.3d 993, 996 (9th Cir. 2009) (upholding narrow admission of otherwise excluded evidence after “the door ha[d] been opened” by defendant).

IV. CONCLUSION

Accordingly, the Court GRANTS the Government’s Motion to Exclude Prior Convictions of Witness (Dkt. No. 73).

Dated this 20th day of September 2023.


 Tana Lin
 United States District Judge